Office-Supreme Court, U.S.
FILED
AUG 30 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 240

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California corporation, and EASON MONROE,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

Brief of Amicus Curiae in Support of Petition for Writ of Certiorari to Supreme Court of the State of California.

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I.

Interest of Amicus Curiae.

This Brief of Amicus Curiae is filed pursuant to Rule 42 of the revised rules of this honorable Court and in accordance with the written consent of all parties to this case attached to the original of this Brief as Exhibit "A".

The American Jewish Congress is vitally concerned with and affected by the availability of forums at which persons of every persuasion and political belief, be they Communists, American Nazis, John Birchers,

World Federalists; Black Muslims or Vegetarians, are able to express their views and opinions and hear such views and opinions challenged, reported and tempered in the free market place of ideas. It believes that the rule of the Los Angeles Board of Education here involved strikes a significant and unconstitutional blow against the availability of such forums and, if permitted to stand, will lead to the proliferation of such rules, ordinances and laws, with the inevitable result of further limiting and restricting the promulgation of the hetorodox, the provocative and the revolutionary ideas on which our nation was founded and grew to greatness. In sum, the issues presented by this case are of great moment and vitally affect the interests of this amicus and all other Americans who agree that not only must speech be left free and untrammeled but that forums must remain available for the free and unfettered dissemination of such speech.

II.

Facts.

Petitioner ACLU is one of the leading libertarian organizations in this Nation whose members, coming from all walks of life and from all political persuasion, are bound together by an abiding faith in our democratic heritage and institutions. It applied for a permit to use the auditorium of the John Burroughs Junior High School in Los Angeles for a series of public bi-monthly meetings on the subject of the "Bill of Rights". Its application was denied solely because it

refused to comply with Los Angeles Board of Education Rule 1316 which requires every person or group requesting the use of school premises made available to the public under the California Civic Center Act (Ch. 4, Div. 12, Cal. Ed. Code, Section 16551 *et seq.*) to sign an oath under penalty of perjury that "to the best of his knowledge, the school property for the use of which application is hereby made will not be used for the commission of any act which is prohibited by law or for the commission of any crime, including, but not limited to, the crimes specified in Sections 11400 to 11401 of the California Penal Code" (the California Criminal Syndicalist Act). As adopted, the California Civic Center Act which makes available school auditoriums for public meetings provided in part as follows:

> "*Creation of civic centers and authorization of use of other properties.* There is a civic center at each and every public school building and grounds within the State where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Gov-

> erning boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities. (Cal. Ed. Code, Section 16556)."

The draftors of this Act attempted to exclude from its purview any group or persons affiliated with a group which has "as one of its objects . . . the overthrow or advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means". The Act as originally drafted further provided that the local school board could require an affidavit showing that the applicant was not a member of or such a proscribed organization. However, the Supreme Court of California in *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885 (1946) held such limitation on the usage of a civic center violated the First Amendment of the U. S. Constitution. That court, relying upon this Court's opinion in *DeJonge v. Oregon*, 299 U. S. 353 (1937), held that while the State had no duty to make available school premises for public assembly and speech, once it had done so it could not unconstitutionally prevent certain members of the public from using such premises for lawful means. The California Supreme Court, relying upon *DeJonge* held

> "if it is unconstitutional for the State to prohibit certain persons or groups classified as 'subversive elements' from exercising their rights in

free speech and assembly at places where others are allowed to speak and assemble, it is a *fortiori* unconstitutional to require proof from any persons or groups that they are not a subversive element." (28 Cal. 2d at 548).

After the *Danskin* decision, the Civic Center Act was amended to provide in Section 16564 thereof that any use of a civic center by a person or group "for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States or of the State by force, violence or other unlawful means shall not be permitted or suffered".

And Section 16565 was also amended to require the applicant to sign a statement under penalty of perjury that to the best of his knowledge (1) "the school property [applied for] will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States by force, violence or other unlawful means; (2) that "the organization on whose behalf he is making application . . . does not . . . advocate the overthrow of the government of the United States or of the State of California by force, violence, or other unlawful means, and . . . is not a Communist-action organization or Communist-front organization . . .". The Supreme Court of the State of Cali-

fornia in *A.C.L.U. v. Board of Education of the City of Los Angeles*, 55 Cal. 2d 167, 359 P. 2d 45 (1961) declared these sections of the Civic Center Act unconstitutional under the First Amendment of the Federal Constitution as constituting an unlawful prior restraint on speech and assembly. The Court reasoned that the oath required

> "amounts to a censorship in advance of the right of assembly and free speech upon the mere determination of the probability of its future misuse. Prior censorship upon such a prophetic finding can certainly only be justified, if at all, upon the clearest sort of showing that such misuse will with reasonable certainty occur." (55 Cal. 2d at 179).

The court then went on to hold that no such showing was made in this case nor could be implied from the mere failure of the A.C.L.U. to sign the oath in question.

This, then, is the historical setting in which the Los Angeles Board of Education adopted Rule 1316. As clearly demonstrated both by the minutes of said Board of Education dated April 6, 1961 and the specific incorporation of the California Criminal Syndicalist Act, the clear and explicit purpose of Rule 1316 was to do by indirection what the State of California by direction on two prior occasions was constitutionally prevented from doing: restrict the use of civic centers and forbid their use by Communists, Communist-front and Communist-action organizations.

III.

Argument.

Rule 1316 of the Los Angeles School Board on Its Face and as Applied to Petitioners Constitutes an Unconstitutional Prior Restraint on Free Speech and Assembly and Is Therefore Violative of the First Amendment to the Constitution to the United States.

With this history in mind, we turn to the basic contention of amicus herein which is: That the oath in question both on its face and as applied to petitioners constitutes an unlawful prior restraint on free speech and assembly.*

That the oath in question constitutes a prior restraint on speech and assembly cannot be gainsaid. This Court on numerous occasions has held or declared that any oath, restriction or license which constitutes a condition precedent to speaking or assembling constitutes a prior restraint on such speech and assembly.

See *e.g.*, *N.A.A.C.P. v. Alabama*, 357 U. S. 449 (1958). (Order to compel disclosure of names and addresses of all Alabama members unconstitutional restraint on freedom of speech and association.)

Grosjean v. American Press Co., 297 U. S. 233 at 244-245 (1936). (State law imposing license tax on gross receipts of advertising revenues of newspapers of over 20,000 per week circulation unlawful prior restraint on freedom of press since "direct tendency is to restrict circulation".)

Hague v. C.I.O., 307 U. S. 496 at 516 (1939). (Municipal ordinance requiring permit for assembling

*Amicus agrees with the other points raised by Petitioners in their petition for certiorari, but believe that no additional argument or points and authorities are necessary in support thereof.

on public streets which could be refused by issuing authority upon belief that would prevent "riot, disturbance, or disorderly assemblage", held void on its face.)

Schneider v. Irvington, 308 U. S. 147 at 163-164 (1939). (Municipal ordinance requiring permit to, *inter alia*, distribute circulars which might be refused on ground applicant not of good character or canvassing for project not free from fraud unconstitutional prior restraint when applied to noncommercial canvassing by one who distributes booklets published by a religious organization.)

Cantwell v. Connecticut, 310 U. S. 296 at 305 (1940) (State statute prohibiting any person from soliciting money for alleged religious or charitable organization without first obtaining certificate from public officer determining its bona fides, *inter alia*, unconstitutional prior restraint when applied to Jehovah's Witness sect.)

Thomas v. Collins, 323 U. S. 516 (1945). (State statute requiring labor organizers to register with state official before soliciting members unconstitutional prior restraint of speech and assembly.)

Saia v. New York, 334 U. S. 558 (1948). (Municipal ordinance prohibiting use of amplifying devices on public streets without permit constituted unlawful prior restraint on speech.)

Kunz v. New York, 340 U. S. 290 (1951). (City ordinance requiring permit to hold religious meeting upon the streets unconstitutional on its face as a prior restraint on speech.)

Staub v. Baxley, 355 U. S. 313 (1958). (Municipal ordinance requiring persons who solicit member-

ship in any organization requiring payment of dues void on its face as unconstitutional prior restraint on speech.)

See also Emerson, *Doctrine of Prior Restraint*, 20 Law and Contemp. Prob. 648 (1955).

The teaching of the above cited cases has been correctly summarized by Emerson, *supra*, as standing for the proposition that prior restraint includes "legislative restraints which make unlawful public or other communication unless there has been previous compliance with specific conditions imposed by legislative act." (*id.* at 650).

Indeed, the Supreme Court of California itself recognizes that the oath in question does constitute a prior restraint on speech and assembly. Thus, the Court admits: "In a very limited sense, the requirement that one state in advance that he will not knowingly commit an illegal act constitutes a prior restraint. . . ." (50 A. C. at 223). See also, *American Civil Liberties Union v. Board of Education*, 55 Cal. 2d 167 at 178, 359 P. 2d 45.

Having established that Rule 1310 constitutes a prior restraint on speech and assembly, amicus turns now to a demonstration that such prior restraint was unconstitutional.

While it is true that a prior restraint on speech or assembly is not *ipso facto* unconstitutional, only in the most exceptional of cases can such prior restraint be upheld. Thus, in the landmark and still leading case on the subject, *Near v. Minnesota*, 283 U. S. 697 (1931) this Court struck as an unconstitutional prior restraint on speech the application of a Minnesota statute permitting the restraining of publication of

"malicious, scandalous and defamatory newspapers" to the publication of a newspaper whose nine previous issues had been admittedly libelous, scurrilous and anti-semetic. In an opinion by Chief Justice Hughes, the Court declared:

> "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is not absolutely unlimited. But the limitations has been recognized only in exceptional cases."

and held the case before it was not such an exceptiona case. And in *Burstyn v. Wilson*, 343 U. S. 495 at 504 (1952) this Court, in striking down a state statute banning the exhibition of sacrilegious motion pictures, declared:

> "This court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota*, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' Id. 283 U. S. at 716, 75 L. ed. 1367, 51 S. Ct. 625. In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case."

And in the most recent restatement and application of the prior restraint doctrine of which amicus is aware, Judge Breitel in the case of *Rockwell v. Morris*, 211 N. Y. S. 2d 25 (Sup. Ct. App. Div.) *aff'd per curiam*, 176 N. E. 2d 830 (N. Y. Ct. App.), *cert. denied*, 368 U. S. 913 (1961) reversed the lower court's upholding the refusal of the New York City Park Commissioner to grant a permit to George Lincoln Rockwell, the self-styled leader of the American Nazi party to speak in a public park, declaring:

> "There is no power in government under our Constitution to exercise prior restraint of the expression of views, unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal—not that such expression, without itself being unlawful, will incite criminal acts in others."

Nor does the disputable decision of this Court in *Times Film Corp. v. Chicago*, 365 U. S. 43 (1961) weaken the above authority since there the five-membered majority was faced with and ruled upon a broadside attack which sought to have an admitted prior restraint declared unconstitutional in *every case*. The majority was careful to limit its decision simply to reaffirming the fact that prior restraints *as applied to the movie industry* are not *ipso facto*, unconstitutional. While amicus is not prepared to concede that *Times Film* was properly decided, it in no way (as the California Supreme Court erroneously thought) decides the instant case, since here we deal with a concrete situation: an application by the A.C.L.U. to use a civic center for public meetings on the Bill of Rights. As such, Rule 1316 clearly constitutes an

unconstitutional prior restraint on speech and assembly under the First Amendment of the U. S. Constitution, as applied to the States and their political subdivisions under the 14th Amendment. See *e.g., Schneider v. Irvington, supra; Cantwell v. Connecticut, supra.*

Amicus also believes that Rule 1316 is invalid on its face since it obviously proscribes speech and assembly in situations not limited to the exceptional cases articulated in the *Near* case in which a prior restraint may be justified. *Grosjean v. American Press Co., Saia v. New York, Kunz v. New York, Staub v. Baxley, supra.*

Conclusion.

Amicus submits that on the basis of the foregoing authorities of this court, the Los Angeles Board of Education rule in question infringes the First Amendment of the United States Constitution and that this type of invidious and unconstitutional rule should not be left standing by this honorable court who should grant the petition for certiorari on file herein in order to state once more, as it has stated in so many cases in the past, that unconstitutional prior restraints on freedom of speech and assembly shall not be sanctioned.

The type of oath before the court is one that obviously will not prevent someone who in fact wishes to use school property for illegal purposes from proceeding with his plan. On the other hand, members of certain religious faiths such as the Quakers and Jehovah's Witnesses and members of certain liberal organizations such as the A.C.L.U., as well as numerous other people and organizations who hold strong ideals respecting freedom of speech and rights of privacy, will be prevented by their conscience and by this illegal

rule from stating their views to the public. Thus this oath, like the oath formerly required under the National Defense Education Act, will have the same invidious effect as expressed by President (then Senator) Kennedy in the Hearings before the Sub-Committee on Education on S.819 to amend the loyalty provisions of the National Defense Education Act of 1958.

Mr. Kennedy stated there:

> "The sole justification for this requirement seems to be that it might prevent a card-carrying member of the Communist Party from benefiting from a loan for educational purposes made by the school and the Federal Government. I would doubt, however, that any member of a truly subversive organization would have the slightest hesitancy in perjuring himself. This provision does not keep such persons out of the program. *But it may well eliminate those who resent the requirement, those who find it inconsistent with their ideals*, those who are overapprehensive in their interpretation, those who are *conscientiously opposed to test oaths, those who believe that there should be no restriction upon freedom of thought and freedom of belief*. And those who are willing to sign such an affidait are not always by that act necessarily proven to be more loyal or more talented than those who do not sign." (Emphasis supplied.)

Respectfully submitted.

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